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In the

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,
Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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23 pp

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Ninth Circuit erred in holding that a temporary planning moratorium cannot constitute a temporary taking under the Fifth Amendment of the U.S. Constitution?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526

U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

STATEMENT OF THE CASE

Since 1969, when California and Nevada signed a compact creating the Tahoe Regional Planning Agency ("TRPA"), property owners in the Lake Tahoe region have been fighting for the right to develop, or make any use at all, of their property. In 1969, TRPA adopted land-use Ordinance No. 4, which, among other things, classified the land in the basin according to its "high" or "low" susceptibility to environmental hazards. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 767 (9th Cir. 2000).

Subsequently, in 1980, the two states amended the compact so that TRPA could develop a new regional plan. TRPA then enacted two separate measures to prohibit development during formulation of the revised plan. *Id.* at 767-78. First, TRPA enacted Ordinance 81-5, which became effective on August 24, 1981 and prohibited most

residential and all commercial construction on high hazard lands. *Id.* at 768. The second resolution, Ordinance 81-5, which became effective on August 24, 1981, put in place a development moratorium on all development of all of the covered land. *Id.* Although the resolution was drafted to expire after a ninety-day period, it was extended until the new regional plan was adopted. *Id.*

On April 26, 1984, TRPA adopted its new regional plan. *Id.* The restrictions on development of "high-hazard" lands in Ordinance 81-5, however, still remained in place due to temporary measures adopted by TRPA. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226, 1236 (D. Nev. 1999), *rev'd*, 216 F.3d 764, 767 (9th Cir. 2000). On May 1, 1984, a temporary restraining order was also issued, restricting development of those lands. *Id.* A permanent injunction restricting development was issued in August of 1984, which remained in force until another regional plan was adopted in 1987. *Id.* The restrictions on development of the "high-hazard" lands in the Lake Tahoe area, however, still continue today, under subsequent development plans.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 228 F.3d 998, 999 (9th Cir. 2000) (denying pet. for rehearing *en banc*) (Kozinski, J., dissenting). Thus, for over two decades, property owners of this "high-hazard" land in the Lake Tahoe region have been restricted from any development of their land.

SUMMARY OF ARGUMENT

In the context of physical takings, this Court recognizes no distinction between takings that are permanent or for an interim period. *See, e.g., United States v. Dow*, 357 U.S. 17 (1958); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Likewise, there should be no distinction, with respect to regulatory takings where there has been a total deprivation of all economically beneficial and productive use of the property.

If any regulation, temporary or otherwise, requires a property owner "to sacrifice all economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,

1019 (1992). Indeed, the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017; *see also United States v. Dow*, 357 U.S. 17 (1958) (holding that temporary use and occupation of property government is a taking for which just compensation is "measured by the principles normally governing the taking of a right to use property temporarily"); *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) (holding that government occupancy of property for "a day, a month, a year, or a series of years" has a value that may be unconstitutionally taken without just compensation); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1946) ("These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period.").

Furthermore, as this Court held in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. 304, 319 (1987). Thus,

whether a regulation is imposed for three months, three years, or until it may be invalidated by court declaration or abandoned by the government, if the regulation deprives a property owner of all economically beneficial use of his or her land, the Fifth Amendment demands payment of just compensation.

ARGUMENT

I. Whether Permanent or Temporary, a Taking of All Economically Beneficial Use of Property Demands Payment of Just Compensation.

The right to own and enjoy one's property is one of the fundamental rights on which our system of law is based. James Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment. In *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003 (1992), the Court explicitly recognized that the Just Compensation Clause helps define a property owner's understanding of his or her rights in property:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.

Id. at 1028 (emphasis supplied)

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does

from technical concepts of property law.").

The requirement of a stable system of property rights for which the government's taking of private property triggers the duty to pay just compensation is reflected throughout takings jurisprudence. For example, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals held that "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1275 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (holding that property consists of recognized expectancies)).

Using this historical basis for the Just Compensation Clause, this Court has extended its application to both physical takings as well as regulatory takings of private property for public use. In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that physical occupation of private property is a *per se* violation of the Fifth Amendment:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such

> an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Id. at 433-35 (citations omitted).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the taking of all beneficial and productive use of private property is tantamount to a physical taking and thus is also a *per se* violation of the Just Compensation Clause:

> [The] total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. . . . Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land.

Lucas, 505 U.S. at 1017, 1028-29 (citations omitted); *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d

1560, 1564-65 (Fed. Cir. 1994) ("The recent Supreme Court decision in *Lucas* . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land--destroying its economic value for private ownership--the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.").

Furthermore, such a regulatory taking may be permanent or temporary. As Justice Kennedy noted in his concurrence in *Lucas*, "[t]he potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. . . . [The Beachfront Management Act] may have deprived petitioner of the use of his land in an interim period. If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones." *Id.* at 1032-33 (Kennedy, J., concurring) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)).

II. The Court Below Erred in Holding That a Temporary Planning Moratorium Cannot Constitute a Temporary Taking.

This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), held that "temporary takings which, as here, deny a landowner all use of his property, are *not different in kind* from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 319 (emphasis added). In so holding, the Court recognized several different factual scenarios upon which a "temporary" taking might be established.

First, the Court recognized that a temporary taking may arise when the government "temporarily exercise[s] its right to use private property," constituting a temporary physical taking. *See Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (determining just compensation for temporary physical occupation of laundry to provide laundry and dry cleaning service for members of the armed forces); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (holding that the taking of a leasehold, even

though temporary, required just compensation since "[i]f any property is taken, compensation is required"); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (holding just compensation due for the government's temporary use a specially equipped warehouse held under long-term lease). "'In such cases compensation would be measured by the principles normally governing a taking of a right to use property temporarily.'" *First English*, 482 U.S. at 318 (quoting *United States v. Dow*, 357 U.S. 17, 26 (1958)). It is thus unquestioned that temporary physical takings are compensable under the Fifth Amendment.

Another instance when a temporary taking may arise, as the Court recognized in *First English*, is when the government imposes a regulation which deprives a property owner of all economically viable use of his property, and later, abandons enforcement of the regulation or acquiesces in a judicial declaration that the regulation effected an unconstitutional taking. The *First English* Court held that "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the

demands of the Just Compensation Clause." *Id.* at 319.

The *First English* Court did not hold, however, as the court below suggests, that a temporary taking may not arise when a regulation is only imposed for a finite period, such as the temporary planning moratorium in the present case. Indeed, the Court in *First English* held that the issue centered on whether all use of the property had been deprived: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.

Furthermore, similar to the moratorium imposed in the present case, the ordinance at issue in *First English* was an "interim" ordinance, passed in response to an emergency flood situation. The fact that the ordinance was labeled "interim" indicates that such ordinance would have been in effect only for a finite time period until a permanent ordinance could be adopted. The Court in *First English*, however, did not require the property owners to wait until a final ordinance was enacted, however, to find that a

compensable taking had occurred.

Further, while in theory, development moratoria are imposed for a finite time period, in reality, these moratoria may suspend development indefinitely. *See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998, 1001 (9th Cir. 2000) (denying petition for rehearing *en banc*) (Kozinsky, J., dissenting) ("[S]o-called temporary moratoria have a habit of living beyond their purported termination dates. In this case, a series of consecutive development moratoria has prevented the landowners from building any homes on their lots for two decades since the start of this litigation.").

Thus, a regulation that deprives a property owner of the use of his or her property for such a lengthy time period, or indeed indefinitely, is a taking of property under the Fifth Amendment, whether or not the regulation is imposed "permanently." This comports with the various cases in which lower courts have held that extraordinary delay by the government in issuing a permit or making a permitting decision may constitute a temporary taking. *See e.g.*, *Tabb Lakes. Inc. v. United States*, 26 Cl. Ct. 1334, 1352-54

(1992) ("In evaluating the reasonableness of . . . the permitting process . . . the key factor that the court must analyze is whether 'extraordinary delay' in the governmental decision-making process gives rise to a temporary taking."); *Dufau v. United States*, 22 Cl. Ct. 156, 163 (1990) ("The Supreme Court has suggested that 'extraordinary delays' in the process of government decision-making may give rise to a temporary taking claim.") (citing *First English*, 482 U.S. at 321; *Agins v. Tiburon,* 447 U.S. 255, 263, n.9 (1980)).

CONCLUSION

There is no basis under the Constitution for distinguishing between physical takings and regulatory takings with respect to a temporary takings analysis. The key question, therefore, in a regulatory takings case, should not be how long a regulation is imposed but rather, whether, due to that regulation, a property owner was deprived of all economically beneficial or productive use of his or her property. If a property owner is temporarily deprived of all economically beneficial or productive use of his or her property, then his or her property has been taken and he or

she must be compensated under the Fifth Amendment.

Respectfully submitted,

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